In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 823

PAN AMERICAN PETROLEUM CORPORATION, PETITIONER

v.

KANSAS-NEBRASKA NATURAL GAS COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

The Solicitor General files this memorandum upon behalf of the Federal Power Commission, as *amicus curiae*, in response to the request of the Court that the government state its views in the above-entitled case on the question of whether there is a conflict with the Natural Gas Act. The Commission is of the opinion that on the particular facts of this case the decision of the court below does not conflict with the Natural Gas Act or impair the agency's role in the administration of that statute.

The facts which give rise to this controversy are novel and cannot be expected to recur. Briefly, they are as follows:

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Between 1949 and 1952, the parties—petitioner as seller and respondent as buyer—freely contracted for the sale of gas at specified prices ranging between 7¢ and 10¢ per Mcf. The contracts further provided that the price would be adjusted upward if any state or federal agency "having competent jurisdiction" should fix a higher rate.

Thereafter, on December 2, 1953, the Kansas Corporation Commission promulgated an order which purported to establish a minimum price of 11¢ per Mcf. In July, 1954, the Federal Power Commission implemented this Court's decision of June 7, 1954, in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, by issuing Order No. 174, 13 F.P.C. 1195, as amended by Orders Nos. 174–A and 174–B, 13 F.P.C. 1255 and 1576 (18 C.F.R. 154.92–154.103). This order required independent gas producers to file with the Commission rate schedules "setting forth the terms and conditions of service and all rates and charges * * * effective on June 7, 1954," together with "a statement showing actual billing for a recent month in sufficient detail to show how the billing amount is determined." "Rate Schedule" was defined as "the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954, * * * ."

Petitioner, Pan American, thereupon filed with the Commission copies of (1) its contracts with respondent; (2) the Kansas minimum price order, which, had it been valid, would have resulted in an increase in the contract rate; and (3) a recent billing statement

showing 11¢ as the rate being paid by respondent, Kansas-Nebraska.

Subsequently, in January 1958, this Court ruled, *per curiam*, that the minimum price order was invalid. *Cities Service Gas Co.* v. *Kansas Corporation Commission*, 355 U.S. 391. Upon remand, the Kansas Supreme Court concluded that the effect of this Court's decision was to hold the State's minimum price order void *ab initio*. *Id.*, 184 Kan. 540, 337 P. 2d 640, certiorari denied, 361 U.S. 836.[1]

The instant suit, grounded upon diversity jurisdiction, was filed by respondent in the United States District Court for the District of Nebraska and sought recovery of overpayments which Kansas-Nebraska had made to petitioner prior to this Court's determination that the State minimum price order was invalid. Both courts below have ruled that the lawful rate for the period in question is the contract rate filed with the Federal Power Commission without enhancement by reference to the void State order and that restitution may be decreed on ordinary contract principles for the amount representing the difference between the contract rate and the rate invalidly prescribed by the State authorities.

Viewing the case in the light of its particular facts, we believe that the decision below does not conflict

[1] In 1957 an increased rate of 11.055¢ per Mcf was filed and "accepted for filing" to cover a Kansas state severance tax. That tax was later declared invalid by the Kansas Supreme Court. *State* v. *Kirchner*, 182 Kan. 622, 322 P. 2d 759. Respondent did not seek reimbursement of this item in this case (Pet. App. 5a–6a).

with the regulatory authority of the Power Commission. It is important to emphasize what it does *not* involve. This is not a situation in which a collateral attack has been made upon a Commission determination that a rate meets the substantive standards of the Natural Gas Act. See Sections 4, 5(a) and 7 (15 U.S.C. 717c, 717d(a) and 717f). Nor is it a case where, after the Commission has accepted a rate filing, a party to the contract underlying the rate seeks to litigate in some other forum either the rate's justness and reasonableness or the construction of the contract—matters which we believe fall within the Commission's primary jurisdiction. See *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246.

Petitioner, we stress, is not contending that the condition in its contract providing for an increase in the event that a higher rate is fixed by a governmental agency "having competent jurisdiction" is satisfied by the Kansas minimum price order. In substance, it argues that, although the Kansas order was concededly beyond the State's jurisdiction and therefore 11¢ was not due by contract, nevertheless the very fact that the void order was filed with the Federal Power Commission makes it the binding rate until the Commission enters an order striking it down.

This, therefore, is a case in which the following distinct circumstances appear. There is an unambiguous contract on file with the Commission, its terms and

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[2] As to questions of contract interpretation not in fact involving administrative expertise, review of a Commission determination is, in effect, *de novo*. *Texas Gas Corp. v. Shell Oil Co.*, 363 U.S. 263, 270. But nothing in that opinion suggests that such questions may be initially litigated in any court.

meaning undisputed, providing for a fixed rate or such higher rate as might be fixed by any State or federal agency "having competent jurisdiction". (If there had been a dispute involving the technical meaning of the documents, the appropriate procedure, in our view, would have been to refer that question to the Commission. Cf. *United States* v. *Western Pac. R. Co.*, 352 U.S. 59.) Payments were made, under protest, at the higher 11¢ figure fixed by the Kansas Commission in a minimum price order. This order, the courts have definitively determined, was void *ab initio* because of the State's lack of jurisdiction.

On these facts, the consideration that, prior to the determination that the Kansas order was invalid, the Federal Power Commission "accepted" a rate schedule (R. 54) accompanied by documents which indicated that the pipeline was being billed at the 11¢ figure set by the Kansas Commission cannot, in our view, operate to breathe life into a law which courts of competent jurisdiction have held was stillborn. Cf. *Kerr-McGee Oil Industries Inc.* v. *Federal Power Commission*, 260 F. 2d 602 (C.A. 10). In other words, the Commission's acceptance of the rate filing must be deemed to have been at the rate provided in the contract filed by the parties, rather than at the higher rate directed by the Kansas Commission in an order which proved a nullity. On this premise, there would clearly seem to be a right to restitution. *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, 347.[3]

[3] We note that the *amicus curiae* brief of Western Natural Gas Company suggests (pp. 11-12) that a determination that the pipelines are entitled to restitution as a result of an action

We need not speculate as to what would have been the situation if the Federal Power Commission, on motion of Kansas-Nebraska, had adjudicated the validity of the Kansas order, if it had erroneously concluded that the order was valid, and if Kansas-Nebraska had thereafter failed to challenge that determination under the procedures provided by Section 19 of the Natural Gas Act (15 U.S.C. 717r). Whether or not in such circumstances the Commission's action would have been *res judicata* as to Kansas-Nebraska or would otherwise have estopped it from claiming its contract rights, it is clear that the Commission did not attempt to adjudicate the matter here. Moreover, the fact that the lower courts have acted in this instance without a prior determination by the Commission does no violence to the regulatory scheme since they have not decided any question of a kind which necessitates agency determination. The crucial ques-

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in contract might leave them with a windfall profit not passed on to their customers. We point out that in fact Commission orders in subsequent rate cases, involving all of the principal pipelines operating interstate from the Kansas gas fields, including Kansas-Nebraska, have included provisions requiring them to pass on to their customers refunds they receive as a result of the fact that the Kansas minimum rate orders have been held to be invalid. See *Colorado Interstate Gas Co.*, 20 FPC 874, 879, par. (E); *Cities Service Gas Co.*, 15 FPC 1448, 1457, par. (D); *Kansas-Nebraska Natural Gas Co., Inc.*, Docket No. G-12391, July 17, 1959, 25 FPC 448, 459, 508-509; *Panhandle Eastern Pipe Line Co.*, Opinion No. 344, 25 FPC 787, 805, par. (F); *Northern Natural Gas Co.*, 13 FPC 773, 777, Fng. (4).

tion in this litigation was determined when this Court held the Kansas minimum price order invalid. The courts are now equally empowered to determine whether that decision, by operation of law, gave rise to a right of restitution.

Respectfully submitted.

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